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Supreme Court of Alabama.

BUTLER v. ELYTON LAND CO. ET AL.

In Alabama, the brother of a deceased intestate bastard by the same mother, is entitled to inherit land of which such intestate dies seised, to the exclusion of the mother.

The law is the same in Ohio, Rhode Island, Vermont and Virginia, but otherwise in Missouri.

Stevenson's Heirs v. *Sullivant*, 18 U. S. (5 Wheat.) 207, 1820, not followed.

BILL in equity by Mary Butler, averring that she was the mother of two illegitimate sons, one of whom had died, intestate, unmarried and without issue, possessed of a contract for the purchase of certain real estate in Alabama, upon which part payment had been made to the Land Company, and a bond for title executed by them to him; that the surviving son had obtained possession of said bond, and, claiming to be the sole heir of his deceased brother, had disposed of the same to Going, one of the defendants; that Going had obtained title from the Land Company, and praying that Going be decreed to hold the land for the use of the complainant, and that the Land Company be decreed to make her a clear title to said land.

A demurrer, that complainant was not heir-at-law of her deceased son, being sustained, appeal was taken to this Court.

W. M. Brooks and *Barnes & Barnes*, for appellant.
Webb & Tillman, for appellees.

SOMERVILLE, J. This case turns on the proper construction of our statute regulating inheritance between bastard children and their mothers and other kindred; the contest here being one, in effect, between the mother and uterine brother of a deceased bastard, who died seised and possessed of the real estate in controversy.

These sections of the Code (1886) read as follows: Sec. 1921. "Every illegitimate child is considered as the heir of his mother, and inherits her estate, in whole or in part, as the case may be, in like manner as if born in lawful wedlock." Sec. 1922. "The mother, or kindred of an illegitimate child, on the part of the mother, are, in default of children of such

illegitimate child, or their descendants, entitled to inherit his estate." The inquiry is whether the mother, Mary Butler, under this statute, takes the property of her deceased illegitimate son, Gus Peteet, to the exclusion of the latter's half-brother, one Butler Whitney, of the blood of the same mother. It is contended for appellant, that the latter section (section 1922) must be construed to mean that, in default of children of an illegitimate child, the mother shall first inherit; and if there be no mother living at the time of descent cast, then the kindred of the illegitimate child on the part of the mother shall be entitled to take his estate, and not otherwise. The appellee, on the contrary, contends that these sections of the Code are not complete within themselves, but are a part of an entire system of statutes on the subject of descents and distributions, and are to be construed *in pari materia* with them. The Judge of the City Court adopted the latter view of the statute, and we fully concur with him in this conclusion.

These sections are clearly not complete within themselves. It is declared that the mother, or kindred on the part of the mother, shall inherit. The word "kindred" means relations by blood, and includes collateral as well as lineal relations. It includes children of an intestate and their descendants, brothers and sisters, nieces and nephews, cousins, uncles and aunts, and other next of kin. How are these numerous kindred to inherit, and which, if any of them, are to be preferred? And what is to be the share of each one's inheritance? Necessarily, these inquiries are to be answered by reference to the statutes of descents and distributions, which form a part of the same chapter and article in the Code that embrace the sections under consideration. Except so far as declared otherwise, the rule of descent for real estate must be governed by section 1915, Code 1886, and of personal property by section 1924, which precisely correspond to sections 2252, 2261, Code 1876, the law in force at the time of the death of the intestate in the year 1883. There is nothing in the statute indicating a purpose to give the mother a priority of right over the other kindred whose rights are preferred by the statute of descents. If this had been the legislative intent,

it was easy of expression, as appears in the New York statute, which declares that if an illegitimate child die intestate, without descendants, the inheritance "shall descend to his mother; if she be dead, it shall descend to the relatives of the intestate on the part of the mother, as if the intestate had been legitimate:" 3 Rev. Stat. N. Y., p. 42, § 14 (1859). This construction is a necessary result from the settled rule that, in construing a doubtful statute, all statutes *in pari materia*, or relating to the same general subject-matter, are to be taken and examined together in order to arrive at the legislative intent. "All acts which relate to the same subject," said Lord MANSFIELD, in *Rex* v. *Loxdale*, 1 Burr. 447, "notwithstanding some of them may be expired, or are not referred to, must be taken to be one system, and construed consistently." We are also authorized to examine, for the same purpose, the original statute from which the present law was first codified in the form it now appears, which is the same as that in the Code of 1852: Code 1852, §§ 1578, 1579. The language of that Code is identical with that of all other subsequent Codes of the State down to the one now in force. The law prior to codification in the present form, as taken from the Act of 1824, reads as follows: Sec. 4. "Bastards shall be capable of inheriting, or of transmitting inheritance, on the part of their mother, in like manner as if they had been lawfully begotten of such mother; and shall also be entitled to a distributive share of the personal estate of any of their kindred on the part of their mother, in like manner as if they had been lawfully begotten of such mother." Sec. 5. "The kindred of any bastard on the part of his mother shall be entitled to the distribution of the personal estate of such bastard, in like manner as if such bastard had been lawfully begotten of his mother:" Aiken, St. (2d ed.), 1836, p. 129; Clay, Dig. Ala. 1843, pp. 168, 169. This old statute differs in phraseology, but not materially in signification, from the one now embraced in the Code of 1886, brought forward, as we have said, from the Code of 1852. It was intended to remedy the cruel and rigorous policy of the common law in reference to bastards, by which was visited on these unfortunates a stigma which more properly belonged to their parents,

and at the same time to deal with the erring mother in a more liberal spirit of justice as well as of Christian charity. By that law a bastard was *nullius filius* as to the whole question of inheritance. He had no mother or father, no brothers, sisters, or other kindred, no inheritable blood, and hence no capacity to inherit or transmit inheritance save to the heirs of his own body. The supposed origin of this rule has been asserted to be the discouragement of a promiscuous and illicit intercourse between the sexes. It is at least debateable whether precisely the opposite policy, conferring equal rights of inheritance upon legitimate and illegitimate offspring, would not better preserve the high moral duty of chastity between the sexes. This was, to a certain extent, the tendency of the civil and Jewish law, as well as of many other ancient Codes, now everywhere admitted to be more humane and enlightened than the rule of the common law on this subject. The general spirit of modern legislation has accordingly been to sweep away, to a great extent, this unjust and illiberal policy of the English law, and to not only permit bastards to inherit from their mothers, but also, in many instances, to provide for their legitimation by the subsequent marriage of their parents, or by written declaration made for that purpose and duly recorded, and to authorize them to transmit inheritance to kindred of their mother's blood, both collateral and lineal. The laws of Scotland, France, Holland, and Germany all provide that the intermarriage of the parents after the birth of a child shall render such child legitimate—a rule of the canon law, the adoption of which the ecclesiastics urged in vain upon the English parliament in the reign of Henry III. This has long been the law of Alabama; legitimation following from the intermarriage of the reputed parents, and recognition by the father: Aiken, St., p. 129, § 3; Code 1886, §§ 2364–2369.

This construction as to the heritable rights of bastards and their collateral kindred was placed upon the Virginia statute enacted in 1785, and carried into the Code of 1819 of that State. Our old statute, as appears in Aiken's and Clay's Digests, seems to be copied from the Virginia Code. That law was construed by the Virginia Court of Appeals, in *Garland*

v. *Harrison*, 8 Leigh, 368 (decided in 1837); an exhaustive and learned opinion being delivered by three of the five Judges. They all agreed that the purpose of the statute was to confer on bastards, not only the capacity to inherit from their mothers, just as they would do were they legitimate children, but also the power to transmit inheritance to their maternal kindred, both collateral and lineal, as if they had been born in lawful wedlock. The object of the statute, said Judge PARKER, "was to make bastards *quasi* legitimate on the maternal side; to give the bastard a mother and maternal kindred; and to make them heritable from each other, in the order prescribed by the law of descents, as if the bastard had been lawfully begotten of such mother. It places this line, in respect to inheritance, precisely in the situation it would be in if one born in lawful wedlock should die leaving no parental kindred." Judge BROCKENBROUGH said: "A bastard may inherit on the part of his mother, in like manner as if he were the legitimate son of his mother. He may, therefore, inherit from his mother, or from his maternal grandparents, in the direct line, or from his maternal uncle and aunt, or great-uncles and great-aunts, in the collateral, and a half portion from his legitimate or bastard half-brother, in the same manner that a legitimate son could inherit from his legitimate half-brother." Judge TUCKER construed the statute in like manner, to render a bastard "capable of inheriting from all his kindred on the part of his mother, whoever they might be." The whole Court vigorously repudiated the soundness of the decision of the United States Supreme Court, in the case of *Stevenson's Heirs* v. *Sullivant*, 5 Wheat. 207 (decided in the year 1820), and relied on for authority in this case by appellant's counsel, in which that Court had come to a different conclusion in construing the Virginia statute, holding that it prescribed transmission of inheritance lineally, but not collaterally, on the part of the mother of a bastard; in other words, that it conferred on bastards capacity to inherit by descent immediately or through their mother in the ascending line, and to transmit the same to their line of descendants, in like manner as if they were legitimate, but did not authorize brothers, sisters, or other

collateral kin even on the mother's side to inherit from them. The question came before the Virginia Court again in *Hepburn* v. *Dundas*, 13 Grat. 219 (decided in 1856), and still again, four years later, in *Bennett* v. *Toler*, 15 Id. 588; and the case of *Garland* v. *Harrison*, 8 Leigh, 368, was, after renewed discussion, adhered to and re-affirmed.

The Vermont statute provided that "bastards shall be capable of inheriting and transmitting inheritance, on the part of the mother, as if lawfully begotten of such mother"—the precise language of section 4 of the Alabama law, as cited above from Aiken's and Clay's Digests. It was held in *Town of Burlington* v. *Fosby*, 6 Vt. 83 (decided in 1834), that, under the statutes of descents and distributions, one illegitimate child could inherit from another illegitimate child of the same mother, which is the precise question arising in this case. The Ohio statute is in identical language, and the Supreme Court of that State, in *Lewis* v. *Eutsler*, 4 Ohio St. 354 (decided in 1854), repudiated the construction placed on the Virginia statute by the United States Supreme Court in *Stevenson's Heirs* v. *Sullivant*, *supra*, and followed the Vermont decision, where a like statute, as we have seen, was construed. They, without a scruple, overruled the case of *Little* v. *Lake*, 8 Ohio, 289 (decided in 1838), in which *Stevenson* v. *Sullivant* had been followed. It is observable that in none of these cases is there any reference made to the case of *Garland* v. *Harrison*, *supra*. In *Briggs* v. *Greene*, 10 R. I. 495, however, the authority of the Virginia case is expressly adopted in construing a similar statute in Vermont, and that of the United States Supreme Court in *Stevenson* v. *Sullivant* repudiated. It was accordingly held, under a statute precisely like the one in Virginia and the former one in Alabama, that bastard children of the same mother are capable of transmitting inheritance on the part of the mother; and when a bastard dies intestate, leaving a bastard sister by the same mother, her estate will pass to that sister. Opposed to this view is the case of *Bent* v. *St. Vrain*, 30 Mo. 268 (decided in 1860), which follows the United States Supreme Court, without noticing the Virginia decisions; and *Remmington* v. *Lewis*, 8 B. Mon. 606 (decided in 1848), which omits to notice any of the foregoing cases.

We adopt the view of the Virginia Court as being more in accordance with the principles of justice and the enlightened and liberal policy of modern legislation on this subject: *Simmons* v. *Bull*, 21 Ala. 501 and note to same, 56 Am. Dec. 263; Schouler, Dom. Rel. § 381; 2 Kent Com. *208–*214. "Our law of descents," as said by Judge TUCKER, in *Garland* v. *Harrison*, *supra*, "was formed in no small degree upon the human affections; the legislature very justly conceiving that the object of a law of descent was to supply the want of a will, and that it should, therefore, conform in every case, as nearly as might be, to the probable current of those affections which would have given direction to the provisions of such will. Under the influence of these opinions," he adds, "they legislated in reference to bastards." An English Judge long ago said, in harmony with the same idea: "The statute of distributions makes such a will for the intestate as a father, free from the partiality of affections, would himself make; and this," he said, "I call a parliamentary will:" *Edwards* v. *Freeman*, 2 P. Wms. 443. We accordingly hold that, under our present statute of descents and distributions, the brother of the deceased intestate bastard by the same mother is entitled to inherit land of which such intestate dies seised, to the exclusion of the mother. The Chancellor so held; and his decree, sustaining the demurrers to complainant's bill, is affirmed.

At common law a bastard had no heritable blood; in consequence, he was incapable of heirship: Litt. § 188; Doct. & Student Dial., 1 Ch. 7, and could have no heirs save those of his body: Co. Litt. 3 b. This utter disqualification to inherit has been fully recognized in the United States: *Flintham* v. *Holder*, 1 Dev. Eq. (N. C.) 345; *Stover* v. *Boswell*, 3 Dana, 232; *Cooley* v. *Dewey*, 4 Pick. 92; *Bent's Administrator* v. *St. Vrain*, 30 Mo. 268; *Blacklaws* v. *Milne*, 82 Ill. 505; probably in all of them, except Connecticut, which at a very early day declared that the English common law as to bastards did not prevail within her boundaries, but by the common law of Connecticut natural children of the same mother might be heirs to each other: *Brown* v. *Dye*, 2 Root, 280; this was followed by the case of *Heath* v. *White*, 5 Conn. 228, wherein it was held that a bastard could inherit from his mother, and in *Dickinson's Appeal*, 42 Conn. 491, a bastard was recognized as possessing heritable blood, both lineal and collateral.

The hardship of the bastard's case entailed upon him by the sins of his parents attracted the attention of the Legislature, and remedies differing, rather in degree than in kind, have been enacted in the various States. It is proposed in this note to consider

the legislation upon the general subject of inheritance by and from bastards.

As was most natural, the legislation first took the direction of securing to the child the right of inheritance from his mother, and this right is now recognized in all the States, but the consequences flowing from that recognition differ according to the terms of the statutes containing it.

In Florida, Dig. (McClell.) Ch. 92, § 8; Indiana, R. S. (1881) § 2474; Kentucky, R. S. (Bul. & Fel. 1881) Ch. 31, § 5; Missouri, R. S. (1879) § 2169; Rhode Island, Pub. St. (1882) Ch. 187, § 7; *Briggs* v. *Greene*, 10 R. I. 495; Virginia, Code (1887) §§ 2552, 2553; *Bennet* v. *Tolen*, 15 Gratt. 588; *Hepburn* v. *Dundas*, 13 Id. 219; *Garland* v. *Harrison*, 8 Leigh, 368; West Virginia, R. S. (1879) Ch. 66, § 5; it is provided (and formerly was provided in Ohio), that bastards may inherit or transmit inheritance on the part of their mother as though legitimate. Such statutes do not create heritable blood generally between the bastard and his natural collateral relatives, but limit him to inheritance in the cases of lineal ascent or descent: *Allen* v. *Ramsey's Heirs*, 1 Metc. (Ky.) 635; *Scroggin* v. *Allan*, 2 Dana, 363; *Remmington* v. *Lewis*, 8 B. Mon. 606; *Bent's Adm'r* v. *St. Vrain*, 36 Mo. 268; and this conclusion has been rested on the distinction taken between the expressions *ex parte materna* and *ex linea materna*, it being held that the former implied lineal descendants: *Little* v. *Lake*, 8 Ohio, 289. This distinction was questioned in *Lewis* v. *Eutsley*, 4 Ohio, St. 354, but was subsequently upheld in *Gibson* v. *McNeeley*, 11 Id. 131; and *Hawkins* v. *Jones*, 19 Id. 22. The conclusion is also supported by a decision of the Supreme Court of Vermont in *Burlington* v. *Fosby*, 6 Vt. 83. That Court has held, that under the statute of the State one illegitimate child could inherit from another of the same mother. In *Bacon* v. *McBride*, 32 Id. 585, it was asked to hold that such child could inherit from a legitimate child of the same mother, but REDFIELD, C. J., said, "This (the expression on the part of the mother), strictly extends no further than to inheritance between the mother and child. It was by construction, in the case of *Burlington* v. *Fosby*, extended to create the relation of brother and sister between illegitimate children of the same mother. We are now asked to extend it so as to create the same relation between illegitimate children and legitimate children of the same mother. This is certainly going a very great way beyond the statute. It will enable the mother, by illicit means, to supply at will heirs to the property of the legitimate children, who may thus deprive them, in case of the decease of their brother and sister, of the enjoyment of the property claimed from their own father. This is certainly something not contemplated by the Court in the case of *Burlington* v. *Fosby*, and entirely beyond the purview of the statute. In fact the decision in *Burlington* v. *Fosby* went beyond the statute."

In Virginia, the inheritance of the bastard has been held to be as by a person of the half blood, a half portion only being taken: *Garland* v. *Harrison*, 8 Leigh, 368; and this was formerly the case in Mississippi. See Act Feb. 23, 1846, § 4, p. 231.

In some States the heirship of the bastard to his mother is recognized, but he is expressly debarred from the right of representation, either collateral or lineal: California Civ. Code, § 6387; Michigan R. S. (1882) § 5773 *a*; Maine R. S. Ch. 75, § 3; Minnesota, Gen. L. (1878), Ch. 46, § 5;

Nebraska Comp. St. (1885), Ch. 23, § 31; Nevada, Comp. Laws (1873), § 795. But such a provision does not necessarily exclude inheritance between illegitimates of the same mother. See *Estate of Magee*, 63 Cal. 414. The provisions in the other States are not so readily grasped.

In Alabama, a bastard inherits from his mother: Code (1886), § 1921; *Lingen* v. *Lingen*, 45 Ala. 410.

In Arkansas, he may inherit and transmit inheritance from and to any and all collaterals, legitimate or illegitimate: Dig. (1884), § 2524; *Gregley* v. *Jackson*, 38 Ark. 487.

In Colorado, the law is the same as in Alabama: Colorado R. S. (1883), § 1048.

In Georgia, bastards inherit from their mother irrespective of the existence of legitimate children, and from each other; and representation amongst collaterals will extend to illegitimates: Code (1882), § 1800.

In Illinois, the common law continued in force until 1845, when an Act was passed allowing a bastard to inherit from his mother if she remained unmarried: Rev. Stat. 547, § 53; by Act of Feb. 12, 1853, Laws, p. 255; and see *Miller* v. *Williams*, 66 Ill. 91; *Blacklaws* v. *Milne*, 82 Id. 505; he was enabled, in addition, to transmit his property by inheritance to his mother and her children. In 1872, the requirement that the mother should remain unmarried was swept away and the illegitimate is now heir of any person from whom his mother, if living, could have taken: R. S. (1883), Ch. 39, Art. 2, § 2. In the case of *Baless* v. *Elder*, 118 Ill. 436, the facts were as follows: A woman having an illegitimate son, married and had legitimate children, the natural child married and died leaving children; the mother then died and afterwards one of her legitimate children died without leaving issue; it was held that the children of the natural child could inherit as representating their father and his mother.

In Indiana, representation is recognized: R. S. (1881), § 2474.

In Iowa, illegitimates take from their mother: R. S. § 2441; *Crane* v. *Crane*, 31 Iowa, 296; and represent her: *McGuire* v. *Brown*, 41 Id. 650.

In Louisiana, bastards, if acknowledged, succeed to their mother, if she leave no lawful issue; if she leave such issue, alimony only is given to the illegitimates: Code, § 918; they cannot take by representation from the legitimate relatives of their mother: Id. § 921; but may inherit from each other on proof of common maternity; Id. § 923; *Dupré* v. *Caruthers*, 6 La. Ann. 156.

In Maryland, illegitimates of the same mother take from each other: Rev. Code (1873), art. 47, § 30.

In Massachusetts, under R. S. Ch. 61, § 2, and Gen. St. Ch. 91, § 5, while a bastard was declared heir to his mother, he could not take as her representative, either from her lineal or collateral relatives: *Pratt* v. *Atwood*, 108 Mass. 40; *Kent* v. *Barker*, 2 Gray, 535; *Curtis* v. *Hewens*, 11 Metc. 294; but now it is provided by Pub. Stat. (1882) Ch. 125, § 3, that an illegitimate child shall be heir of his motherand of any natural ancestor,and that the lawful issue of an illegitimate shall represent him. This Act gives lineal representation, but does not render the bastard his mother's representative as to collateral inheritance: *Haraden* v. *Larrabee*, 113 Mass. 430.

In New Hampshire, the law is the same as in Alabama and Colorado: Gen. St. (1878) Ch. 203, §§ 4, 5.

In New York, in default of legitimate children, bastards are declared heirs to their mother as if legitimate: R. S., p. 2214; Act 1885, Ch. 547.

The same rule prevails in New Jersey: Stew. Dig. Orphans' Ct., pl. 147 (p. 785).

In North Carolina, by the Act of 1799, bastards were given the right of inheritance from their mother where she had no lawful issue: *Sawyer* v. *Sawyer*, 6 Ired. L. 407; illegitimates of the same mother were allowed to take from each other and legitimates might take with them as coheirs, but the bastard could not inherit from the legitimate children: *Den on dem. Ehringhaus* v. *Cartwright*, 8 Id. 39; this rule was modified under Bat. Rev. Ch. 36, rule 11, only so far as to permit a representation of brothers and sisters: *McBryde* v. *Patterson*, 78 N. C. 412; *Powers* v. *Kite*, 83 Id. 156; and the law governing realty is still the same: Code (1883), § 1281, Rules 9, 10; as to personalty, however, the bastard will take with the legitimate children of the same mother share and share alike: Code, § 1486.

In Mississippi, bastards inherit from their mother and brother's children, and her kindred and their children and descendants from brothers and sisters of their father and mother, whether legitimate or illegitimate, and from their grandparents, but not from any ancestor or collateral kindred, if there be legitimate heirs in the same degree: Rev. Code (1880), § 1275.

In Ohio, bastards inherit from and represent their mothers: R. L. (1884) § 4174.

In Pennsylvania, under the Act of April 27, 1855, § 3, P. L. 368, which provides that illegitimates and their mother "shall respectively have capacity to take or inherit from each other personal estate as next of kin, and real estate as heirs in fee simple, and as respects said real or personal estate, to transmit the same according to the laws of this State," illegitimates shall share equally with legitimates in the estate of their common mother: *Opdyke's Appeal*, 49 Pa. St. 373, but are not legitimated: *Grubb's Appeal*, 58 Id. 55. The Act is not retrospective and does not enable a bastard dying before his mother, to transmit a right from her to his descendants: *Steckel's Appeal*, 64 Id. 493. The Act of June 5, 1883, P. L. 88, provides that "illegitimate children born of the same mother shall have capacity to take from each other personal property as next of kin, and real estate as heirs in fee simple in the same manner as children born in lawful wedlock." This Act does not seem to have been interpreted by the Supreme Court. In *Herbein's Estate*, 2 Chest. Co. Rep. 449, the Orphans' Court held that it did not confer upon the issue of a deceased illegitimate the right to take as his representative from his brothers and sisters.

In Tennessee, bastards were by the Act of 1819, ch. 13, § 1, empowered to inherit from their mother where there were no legitimate children, but their right was strictly limited to the terms of the Act: *Brown* v. *Kerby*, 9 Humph. 461; the right was afterwards so extended as to allow illegitimate brothers and sisters to inherit from each other: Act of 1851, Ch. 39; and this right was extended to legitimate children of the same mother: *Riley* v. *Byrd*, 3 Head, 20; *Webb* v. *Webb*, Id. 68; but under the Act, while legitimate children could inherit from illegitimates of the same mother, the illegitimates could not inherit from the legitimates: *Woodward* v. *Duncan*, 1 Coldw. 563. This inequality was remedied by an Act passed in 1866–67; see Code (M. & V. 1884), § 3274; *Scoggins* v. *Barnes*, 8 Baxt. 560.

In Texas, a bastard may inherit

from and through his mother, and transmit the inheritance: R. S. (1879) Tit. 33, § 1657.

The legislatures have been much more chary with regard to permitting a bastard to inherit from his father than they have been with regard to a maternal inheritance, and for reasons which seem well founded in public policy. In some States, however, a fairly liberal policy in this respect has prevailed.

In California, a bastard becomes heir of the person who by a writing, in presence of a witness, declares that he is his father: Civil Code, § 6587; but the writing must be one executed for the express purpose of changing the status of the child: *Pina* v. *Peck*, 31 Cal. 359; *Estate of Sandford*, 4 Id. 12.

In Iowa, R. S. (1884) § 2466, and Kansas, Comp. St. (1885) § 2261, a bastard acknowledged by his father, or whose paternity is proved in his father's lifetime, may take as his heir. The acknowledgment must be in writing, or notorious, but if in writing it need not be, as in California, formal, and it has been held that a sufficient acknowledgment may be found in a series of letters written by a father to and about his natural son at school: *Crane* v. *Crane*, 31 Iowa, 296. The acknowledgment does not legitimatize the child: *Brown* v. *Belmarde*, 3 Kan. 41.

In Indiana, an illegitimate child who has been acknowledged, will take as heir of his father, who dies without legitimate heirs resident in the United States, or legitimate children, irrespective of residence: R. S. (1881) § 2475. In the fact of acknowledgment the testimony of the mother must be excluded: Id.; and the word "heirs" in the statute is not confined to lineal heirs, but embraces collaterals, so that brothers and sisters resident in the United States will exclude the illegitimate child of the decedent: *Borroughs* v. *Adams*, 78 Ind. 160.

In Louisiana, an acknowledged bastard may take from his father who leaves no descendants, ascendants, or collateral relatives: Code, § 918, or a widow, § 924; but the bastard obtains no right of representation by the acknowledgment: § 921; and an unacknowledged bastard cannot take, although his paternity may have been judicially ascertained: *Dupre* v. *Caruthers*, 6 La. Ann. 186.

In some States, the subsequent marriage of the parents of a bastard has been allowed to confer an heritable quality upon the ante-nuptial progeny. It is well known that by the Roman law the marriage of the parents rendered such offspring legitimate, and that it was to a proposition to introduce the same rule into the English law in thereign of Henry III., that the famous answer, "*Nolumus quod nolint leges Angliæ mutari, quæ hucusque usitatæ sunt et approbatæ*," was given; although more attention to abstract justice and a little less exaggeration of national pride might well have dictated another answer; still, in this country, following in the footsteps of the example set in England, the policy of refusing legitimation to the child on subsequent marriage prevailed for a very long time, indeed until very recently. The example of breaking away from the hard English rule seems to have been set by Virginia, whose legislation about the time of and subsequent to the Revolution showed, by its decided tendency in the direction of justice and freedom, the influence of those great men, profound jurists and statesmen, who then led her, and who in 1785 passed an Act rendering legitimate ante-nuptial children. At present, in the following States the subsequent marriage of the parents of a bastard and his recognition by them,

renders him legitimate: Alabama, Code (1876) § 2742; Arkansas, Dig. (1884) § 2525; California, Civil Code § 6387; Georgia, Code (1882) § 1786; Illinois, R. S. (1883) Ch. 39, § 3; Indiana, R. S. (1881) § 2476; Kentucky, Gen. Stat. (1881) Ch. 31, § 6; Maryland, R. C. (1878) Art. 47, § 29; Massachusetts, Pub. St. (1882) Ch. 125, § 5; Michigan, Rev. Stat. (1882) § 5775, *a*; Mississippi, R. C. (1880) § 1275; Missouri, R. S. (1879) § 2170; New Hampshire, Gen. L. (1878) Ch. 181, § 15; Ohio, R. S. (1884) § 4175; Oregon, Gen. L. (1872) Miscell. Ch. 10, Tit. 3, § 5; Pennsylvania, Act May 14, 1857, § 1, P. L. 507; Texas, R. S. (1879) Art. 1656; Vermont, Rev. L. (1880) § 2233; Virginia, Code (1887) § 2553; West Virginia, R. S. (1879) Ch. 66, § 6.

To cause legitimation there must be recognition as well as marriage; in Michigan, however, marriage only is mentioned in the Act, so that there, perhaps, proof of parentage other than by recognition may be sufficient.

It is not necessary that the process of legitimation be complete in the lifetime of the legitimatized person; it may be completed after his death, provided no vested rights are impaired thereby. This position is illustrated by the case of *Ash* v. *Way's Administrator*, 2 Gratt. 203. In that case, R. Way was the father of an illegitimate child, Mary Ann, whom in his lifetime and at his death he recognized as his own; Mary Ann married Ash and died, leaving a son; after Mary Ann's death, Way married her mother. On the death of Way, the son of Mary Ann claimed to be his legitimate descendant, and a demurrer to his claim was overruled. Acts of the character of those above enumerated may be retrospective and retroactive. The Virginia Act was passed in 1785, an illegitimate child born in 1775, and acknowledged in 1776, was held legitimate within its provisions in *Sleigh* v. *Strider*, 5 Cal. 439. In *Stevenson* v. *Sullivant*, 5 Wheat. 207, the Supreme Court of the United States, on the authority of a dictum of ROANE, J., in *Rice* v. *Efford*, 3 H. & M. 228, held the Act not retroactive, but *Stevenson* v. *Sullivant* was denied by the Court of Appeals of Virginia, in *Garland* v. *Harrison*, 8 Leigh, 368. The retroaction may render legitimate the issue of a deceased person: *Gregley* v. *Jackson*, 38 Ark. 487, and legitimation itself cannot operate to divest vested rights, as for example, to cause a redistribution of property which has already descended to legitimate children: *Killam* v. *Killam*, 39 Pa. St. 120; *McGunnigle* v. *McKee*, 77 Id. 81; or to deprive the State of a vested right to the collateral inheritance tax: *Galbraith* v. *Commonwealth*, 14 Pa. St. 258.

In some States, there are statutory provisions for legitimation upon application by the father to the proper Court; Georgia, Code (1882) § 1787; North Carolina, Code (1883) Ch. 5, § 39; Tennessee, Code (1884) §§ 4381–87; Mississippi, Code, § 1496; in North Carolina, Tennessee, and Georgia there is a requirement that the father must have been unmarried at the time of the child's birth. Legitimation may be by acknowledgment in writing, in Alabama, Code § 2365, and Michigan, Rev. Stat. (1882) § 5775 *a*.

Western States have not gone to the length of declaring a bastard legitimate upon the subsequent marriage of his parents, but have provided for his inheritance in such a contingency; thus, in Colorado, R. S. (1883) § 1045; Maine, R. S. (1883) Ch. 75, § 3, as to children born after March 24, 1864; in Minnesota, Gen. Laws (1878) Ch. 47, § 5; Nebraska, R. S. Ch. 23, § 31; Nevada, R. S.

§ 795; Wisconsin, R. S. § 2274; there is the additional requirements that the parents shall not only marry but have other children before the death of the bastard, and this seems to be the rule with reference to children born before March 24, 1864, in Maine. These statutes, while they do not technically legitimatize the child, seem to confer all the privileges of a legitimate heir, including representation; but in Nevada, Laws, 1885, Ch. 24, § 9, and California, Civil Code, § 5230, there may be a species of legitimation by matter *in pais*, when the father of an illegitimate publicly acknowledges the child as his own and receives it into his family, with the assent of his wife, if he be married, and otherwise treat it as a legitimate.

In certain States, the issue of a marriage deemed null in law is held legitimate. Arkansas, Dig. § 2526; Missouri, R. S. § 2171; Nebraska, Comp. St. Ch. 23, § 31; Nevada, R. S. § 795; Ohio, R. S. § 4175; Texas, R. S. Art. 1656; Virginia, Code (1887) § 2553; West Virginia, R. S. Ch. 66, § 7; Wisconsin, R. S. § 2274.

In Ohio, an attempt was made to confine the words of the statute "deemed null in law," to voidable marriages, but the Court before which the question came refused to adopt such restricted interpretation, and held that the issue of a marriage contracted by a man who had a wife still living was legitimate within the terms of the statute. *Wright* v. *Lore*, 12 Ohio St. 619, and see *Stones* v. *Keeling*, 5 Cal. 143. In Missouri the effect of the statute has been held to allow a guilty father to inherit from his child: *Dyer* v. *Brannock*, 66 Mo. 391.

In California, the statutory provision referred to is, that the issue of any marriage, annulled on the ground that a former husband or wife was living, or of insanity, begotten before judgment, is legitimate: Civ. Code, § 5084; and in Louisiana there is a provision for the legitimation of the offspring of null marriages, but it appears to be confined to cases wherein the parties or one of them has acted in good faith, as where a woman marries ignorantly an already married man: Code, Arts. 119, 120; *Abston* v. *Abston*, 15 La. Ann. 137.

The inheritance by the parents of bastards has also been the subject of legislation, and in all the States the mother may now take by inheritance from her illegitimate child. In Georgia Code, § 1800: Illinois R. S. Ch. 39, § 2; Nevada, R. S. § 796; Oregon, Gen. Laws, Miscell. Ch. 10, § 5, she is postponed to the widow or surviving husband of the illegitimate; in Maine, she shares with the widow or husband: R. S. Ch. 75, § 4; in Louisiana, she takes to the exclusion of brothers and sisters: Code, § 922; *Nolasco* v. *Lurty*, 13 La. Ann. 100; in Colorado, R. S. § 1048, and Illinois and Georgia, *supra*, she shares with them, taking as her part one-half of the inheritance; in the other States the mother of a bastard and her kindred inherit from him as the mother and kindred of a legitimate child would from him so far as the mother's side is concerned; Alabama, Code, § 1922; Arkansas, Dig. § 2524; California, Civil Code, § 6388; Delaware, 2 Laws, Ch. 243; Florida, McClell. Dig. Ch. 92, § 8; Indiana, R. S. § 2477; Iowa, R. S. § 2465; Kansas, Comp. St. Ch. 33, § 22; Kentucky, Gen. St. Ch. 31, § 5; Maryland, R. C. Ch. 47, § 30; Massachusetts, Pub. St. Ch. 125, § 4; Michigan, Rev. St. § 5774 *a*; Minnesota, Gen. Laws, Ch. 46, § 6; Missouri, R. S. § 2169; Nebraska, R. S. Ch. 23, § 32; New Hampshire, R. S. Ch. 203, § 4; New York, R. S. Pt. 2, Ch. 2, § 14; New Jersey,

R. S. (Stewart), p. 1299, pl. 1; North Carolina, Code, § 1281; Ohio, R. S. § 4174; Oregon, R. S. Ch. 10, § 5; Pennsylvania, Purd. Dig. (1872), p. 934, pl. 40; Rhode Island, Pub. St. Ch. 187, § 7; Tennessee, Stat. 1885, Ch. 34; Texas, R. S. § 1657; Vermont, R. S. § 2232; Virginia, Code, § 2552; West Virginia, Act 1882, Ch. 94, § 5; Wisconsin, R. S. § 2273.

Inheritance by the father of the bastard appears to be permitted in but few States. In Kansas and Iowa, the father of an acknowledged bastard, where the acknowledgment is mutual, may take from him; in the latter State, he will, under such circumstances, have the same rights of heirship as the mother of the illegitimate, R. S. Iowa, § 2467: but in Kansas, he will be postponed to the mother and her issue: Dig. § 2262; in Louisiana, the father who has acknowledged a bastard may inherit from him, and if both the mother and father have acknowledged him, they will share equally in his estate: Code, § 922. HENRY BUDD.

Supreme Court of the United States.

ASHER v. STATE OF TEXAS.

The Texas Act, May 4, 1882, imposing a tax on every commercial traveller, drummer, salesman, or solicitor of trade by sample or otherwise, is repugnant to the constitutional power of Congress (to regulate commerce among the several States), and is void.

It is strenuously contended by the Court of Appeals of Texas, in this case, that the decision of this Court, in *Robbins* v. *Taxing District*, is contrary to sound principles of constitutional construction; as to the constitutional principles involved, the views of this Court are quite fully and carefully expressed in the *Robbins* case.

Local burdens imposed upon interstate commerce, by way of taxing an occupation directly concerned therein, as by levying a general license tax on telegraph companies, are unconstitutional.

When a decision of this Court is not in harmony with previous decisions, it has the effect of overruling such prior ones as it is in conflict with, whether mentioned and commented on, or not.

Ex parte Asher, *ante*, p. 77, reversed, and *Robbins* v. *Taxing District*, 120 U. S. 489, and *Leloup* v. *Mobile*, 127 Id. 640, affirmed.

Opinion by BRADLEY, J., October 29, 1888, in full in 128 U. S. 000.